FEB 1
MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173

FRANK GATTO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO, DECEASED,
Plaintiff-Appellee, Petitioner,

vs.

CURTIS, FRIEDMAN & MARKS,
Defendants-Third Party Plaintiffs,

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

MORIARTY, ROSE & HULTQUIST, LTD.,
150 North Wacker Drive,
Suite 2400,
Chicago, Illinois 60606,
(312) 368-4500,
Attorneys for Petitioners.

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
Of Counsel.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Illinois Supreme Court Has Decided a Constitutionally Important Question of Substance Not in Accord with Applicable Decisions of the United States Supreme Court	7
II. The Decision of the Illinois Supreme Court Is Contrary to a Long-Established Public Policy of Favoring Private Settlement of Litigation as Enunciated by the Supreme Court of the United States	8
Conclusion	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No.

FRANK GATTO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO, DECEASED
Plaintiff-Appellee, Petitioner,

vs.

CURTIS, FRIEDMAN & MARKS,
Defendants-Third Party Plaintiffs,

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

The petitioner, Frank Gatto, individually and as Administrator of the Estate of Sophie Gatto, deceased, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in this proceeding on September 26, 1975, rehearing for which was denied on November 21, 1975.

OPINION BELOW.

The opinion of the Supreme Court of Illinois, filed on September 26, 1975, is reported in 61 Ill. 2d 513, 337 N. E. 2d 23. This petition arises out of a reversal of judgments entered

for the plaintiffs and third party plaintiffs (lessors) on the verdicts of the jury on August 13, 1969. In the first appeal, the Illinois Appellate Court affirmed the verdicts and judgments of the court below both as to the facts and law of the case. 6 Ill. App. 3d 714. The Appellate Court denied respondent's petition for rehearing. The Illinois Supreme Court denied respondent's petition for leave to appeal to that court. Three years and eight months after verdict, respondent filed a petition in the trial court to vacate the judgment for the plaintiffs. The second trial judge to whom the matter was assigned reviewed the record and affidavits filed by counsel and, on June 1, 1973, denied respondent's motion to vacate the judgment. No timely appeal was taken from this order containing a specific finding that no fraud was presented which would entitle respondent to relief. Respondent thereafter filed another motion to limit execution on the judgment which the trial judge denied on August 21, 1973. In the second appeal, the Illinois Appellate Court reversed and limited execution on the judgment to $80,000. 23 Ill. App. 3d 628. The Supreme Court of Illinois granted leave to appeal and reversed the judgments, without remandment, on September 26, 1975. Rehearing was denied November 21, 1975.

JURISDICTION.

The jurisdiction of this Court is invoked under Rule 19-1(a) of the Supreme Court Rules, Title 28 U. S. C.

QUESTIONS PRESENTED.

1) Whether petitioner was denied his Constitutional rights to due process of law since no trial was conducted on the merits of the respondent's post-appeal motions as required by the Fifth and Fourteenth Amendments.

BLEED THROUGH

STATEMENT OF THE CASE.

This case is a civil action arising out of a complaint filed for personal injuries sustained by petitioner's intestate on June 19, 1964. The jury returned a verdict in favor of petitioner's intestate in the sum of $100,000 and for the petitioner individually, in the sum of $20,000 against the owners of the property (lessors) in which the injuries were sustained. The jury also returned a verdict in favor of the property owners (lessors) and against the respondent in the sum of $120,000.

During the trial in the court below, counsel for the respondent embarked upon a course of misconduct calculated to create a mistrial. Despite repeated warnings by the trial judge, counsel for the respondent persisted in his obstreperous behavior. At the conclusion of the trial, the trial judge made a lengthy statement summarizing the misconduct of respondent's counsel so that the reviewing court could be fully advised of what had taken place during the trial. A part of that statement follows:

> Now, Mr. Peterson, from the very beginning of the trial in the court's opinion you pursued a course of conduct designed to bring about a mistrial. Now, I have been around a long time and I don't think I misconstrued what you were intending to do and unfortunately the conduct of an attorney, of course, is sometimes visited on his client. I hope it wasn't true in this case, but if it was I feel the client must bear the burden of the unfortunate conduct of its counsel . . . Again, I am not saying this with any animosity towards you personally, but I think your conduct in this trial was very reprehensible. The record, I think, will speak for itself and you sorely tried the patience of both the court and counsel, I can assure you, and I don't believe that you accomplished what you were about to do . . .

The misconduct of counsel for the respondent was also commented upon by various attorneys for the co-defendants. In the first appeal, the Appellate Court reviewed the misconduct of counsel for respondent and noted:

> Reading of the voluminous record shows that the trial judge was indeed confronted with a situation well calculated to try the judicial soul. 6 Ill. App. 3d at 733.

Faced with these bizarre circumstances and threats by counsel for respondent that the plaintiffs would never live to see the day that they would collect any sum of monies from respondent, plaintiffs entered into an agreement with certain defendants at the beginning of the second week of trial. By the terms of the agreement, plaintiffs received $80,000 from the lessors but were required to pay that sum to the lessors out of any verdict that might be entered against the respondent. The trial judge and the attorneys for the defendants were advised of the agreement. Only counsel for respondent denies knowing of the agreement between the parties. However, counsel for respondent filed an affidavit in the trial court which indicated that *during the trial* he reported to his client the exact amount of the payments made to the plaintiffs. Four of the trial attorneys (including attorneys for co-defendants who were not involved in the agreement) filed affidavits confirming notice of the agreement and payments thereunder to counsel for respondent during the trial.

The parties to the agreement of August 1, 1969, were not dismissed from the lawsuit since they had pending claims against remaining defendants (including respondent) which had not been resolved. Under the law of Illinois, the defendants who made payments under the agreement were entitled to pursue their action for indemnity against respondent and other defendants. The jury found the lessors guilty of ordinary negligence (passive tort feasors) and found respondent guilty of willful and wanton misconduct (active tort feasor). Illinois has always permitted indemnity actions by passive tort feasors against active tort feasors. This law was affirmed on appeal in this case, 6 Ill. App. 3d at 731 and reaffirmed in the second appeal, 23 Ill. App. 3d at 640. The Illinois Supreme Court did not reverse on this point of law.

BLEED THROUGH

The jury was not advised of the agreement of August 1, 1969, nor of the payments made thereunder. The law in Illinois at the time of the trial precluded the parties from advising the jury of payments made under the agreement of August 1, 1969. *Tresch* v. *Nielsen*, 57 Ill. App. 2d 469 at 476 (1965). As a matter of fact, the introduction of evidence of payments made to the plaintiff under a covenant has been held so prejudicial to the rights of the plaintiff as to warrant a reversal. *DeLude* v. *Rimek*, 351 Ill. App. 466, 475 (1953).

The sole basis for the reversal of the judgments entered in this case on August 13, 1969, totalling $120,000 was the alleged non-disclosure of the agreement of August 1, 1969. The Supreme Court of Illinois did not reverse on either the facts of the case or the law applied to those facts. After an exhaustive review of the transcript of the trial, the Illinois Appellate Court on two separate occasions affirmed the judgments for the plaintiff. After having been found guilty of *willful* misconduct, respondent has been completely exonerated from the payment of any sum whatsoever on judgments entered against it totalling $120,000.

The trial in this case was conducted in accordance with the basic concepts of due process of law. Counsel for respondent vigorously cross-examined all adverse witnesses and presented the testimony of his witnesses in the trial court. No claim has ever been made that the agreement of August 1, 1969, in any way affected the outcome of the jury verdict. Plaintiff's verdicts were taken away, however, without a trial or in accordance with due process of law as guaranteed by the Fifth and Fourteenth Amendments.

The facts in the voluminous record of this case have been adequately summarized in the opinions of the Illinois Appellate Court. 6 Ill. App. 3d 714 and 23 Ill. App. 3d 628. Petitioner will not attempt to restate those facts in this petition. The following matters are relevant to this appeal:

1. The injuries sustained by the petitioner's intestate were so grotesque that the amount of the award of damages was never raised in either appeal.

2. The liability of the respondent was so evident that the Appellate Court noted:

> There is *ample* evidence in the record to justify both verdicts. 6 Ill. App. 3d at 734.

3. The liability of the lessors-third party plaintiffs was so clear that the Appellate Court concluded:

> . . . The doctrine of *res ipsa loquitur* has frequently been applied to situations such as presented by the case at bar. 6 Ill. App. 3d 731.

4. The negligence of lessors was found to be passive while petitioner was found to be actively guilty of willful misconduct. 6 Ill. App. 3d at page 731.

5. In the second appeal, Justice Goldberg wrote:

> We wish to make it clear that, in our opinion, the result above reached the Calumet is equitably entitled to relief concerning the extent of its liability as an indemnitor does not in any manner rest upon prejudice to Calumet during the trial of the action. On the contrary, there was no prejudice to the rights of Calumet during the trial. No situation developed at trial concerning the effect of the agreement upon any person along lines suggested by the supreme court in *Reese* (55 Ill. 2d 356, 364). Our previous minute examination of the trial record, without knowledge of the existence of the agreement, impelled us to conclude that the judgment of liability for active negligence was properly entered against Calumet as an indemnitor. (See 6 Ill. App. 3d 714, 731.) We cannot conceive that the agreement itself had any bearing upon this result or any effect upon the trial of the issues between plaintiffs and the Lessors. 23 Ill. App. 3d 628 at 640.

6. The Illinois Supreme Court reversed petitioners' judgments, without a remandment, solely on procedural matters.

BLEED THROUGH

REASONS FOR GRANTING THE WRIT.

I. The Illinois Supreme Court Has Decided a Constitutionally Important Question of Substance Not in Accord with Applicable Decisions of the United States Supreme Court.

The *only* evidence offered by the respondent in the trial court consisted of two conflicting affidavits signed by counsel for the respondent. In his first affidavit, counsel for respondent admitted, under oath, reporting the exact amount of the payments made under the agreement of August 1, 1969, to his insurance company *during the trial*. He admitted the confirmation of the exact amounts of payment during post-trial motions (A. 24). In his second affidavit, counsel for respondent sought to contradict his first affidavit (A. 99-100). Both affidavits referred to a letter which counsel for respondent had written to his insurance company client during trial. That letter was never produced. The petitioner filed counter-affidavits of several attorneys for respondents' co-defendants which proved conclusively that counsel for respondent was aware of the payments made to the plaintiffs during trial (A. 143-146).

Petitioner was not afforded the opportunity to have a trial on the merits of the respondent's petition. No hearing was conducted. Petitioner was not given the opportunity to cross-examine counsel for respondent. This was crucial to the petitioner's right to a fair trial, particularly in view of the conflicting affidavits filed by the attorney for the respondent and his failure to produce the written documentation which was summarized in his affidavits. Due process of law required that petitioners be granted this right to confront the attorney for the respondent with cross-examination. Since the Illinois Supreme Court based its reversal of the judgments for the petitioner solely on the affidavits of counsel for the respondent, the right of cross-examination of respondent's counsel was critical to the guarantee of the petitioner's Constitutional rights to due process of law.

Trial by affidavit is not due process of law. This case was reversed without a remandment on a matter which had no affect upon the evidence or law applicable thereto. Even in civil matters, this Court has repeatedly held that the right of an individual to cross-examine adverse witnesses is Constitutionally protected. In *Greene* v. *McElroy*, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 at page 1391, Mr. Justice Warren wrote:

> While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, (citations) but also in all types of cases where administrative and regulatory actions were under scrutiny.

In *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1001, 25 L. Ed. 2d 287 at page 300, Mr. Justice Brennan reaffirmed the Constitutionally-protected rights of cross-examination by holding:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

II. The Decision of the Illinois Supreme Court Is Contrary to a Long-Established Public Policy of Favoring Private Settlement of Litigation as Enunciated by the Supreme Court of the United States.

The agreement of August 1, 1969, between the petitioner and two defendants was the first loan agreement of record in an Illinois case. Similar agreements had been approved in other States. The first case to reach the Illinois Supreme Court involv-

BLEED THROUGH

ing a loan agreement was *Reese* v. *Chicago, Burlington & Quincy R. R. Co.*, 55 Ill. 2d 356 (1973). The majority opinion followed the reasoning in *Luckenback* v. *McCahan Sugar Refining*, 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53 (1918) approving loan agreements and favoring private resolution of litigation. There was, however, a strong dissent in the *Reese* case which was written by the Justice who reversed the judgment for the petitioner in this case.

At the time of the trial in the court below, petitioner did not have the clairvoyance to foresee the procedural changes that would be brought about by *Reese*. Petitioner did follow the procedural rules which were binding upon him at the time of the trial. Admittedly, the jury was not advised of the existence of the loan agreement of August 1, 1969. The law of Illinois at the time of this trial prevented the introduction of such payments in evidence.

At the time of the trial in the court below, there was substantial federal authority approving loan agreements. The *Luckenback* case, *supra*, held loan agreements valid under federal common law. This case has been followed subsequently in *White Hall Building Corp.* v. *Profexray Division of Litton Industries*, 387 F. Supp. 1202, 1205; *Executive Jet Aviation, Inc.* v. *U. S.*, 507 F. 2d 508 (6th Cir. 1974).

The Illinois Supreme Court, in reversing the petitioner's judgment, deprived the petitioner of his right to enter into a loan agreement under federal common law. The Illinois Supreme Court also deprived the petitioner of his Constitutionally-guaranteed freedom to contract under Article I, § 10, of the United States Constitution. The punitive measures taken by the Illinois Supreme Court were tantamount to the abrogation of petitioner's fundamental right to freedom of contract.

CONCLUSION.

The Illinois Supreme Court acknowledged the petitioner's right to indemnification against the respondent in the sum of $80,000 (61 Ill. 2d 513, 522). The Court, incongruously, however, reversed petitioner's judgment without a remandment for a new trial, thereby depriving petitioner, as assignee of lessor's judgment, to indemnity.

Justice and fairness should preclude speculation on what effect the agreement of August 1, 1969, might have had upon the verdict of the jury. If there is any question as to whether evidence of the existence of the loan agreement could have influenced the verdict of the jury, then this case should have been remanded for a new trial. The trial court could be instructed, on remandment, to allow the agreement to be received in evidence. Petitioner should not be deprived of his judgment because of procedural matters. Due process of law requires procedural errors to be rectified by a new trial rather than outright reversal.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

MORIARTY, ROSE & HULTQUIST, LTD.,
150 North Wacker Drive,
Suite 2400,
Chicago, Illinois 60606,
(312) 368-4500,
Attorneys for Petitioners.

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
Of Counsel.

BLEED THROUGH

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

Supreme Court, U. S.
FILED
MAR 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173

FRANK GATTO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO, DECEASED,
Plaintiff-Appellee, Petitioner,

vs.

CURTIS, FRIEDMAN & MARKS,
Defendants-Third Party Plaintiffs,

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant, Respondent.

MORIARTY, ROSE & HULTQUIST, LTD.,
150 North Wacker Drive,
Suite 2400,
Chicago, Illinois 60606,
(312) 368-4500,
Attorneys for Petitioners.

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
Of Counsel.

Blackstone-Warren Printing Company, Chicago • Financial 6-4848

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173

FRANK GATTO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO, DECEASED,
Plaintiff-Appellee, Petitioner,

vs.

CURTIS, FRIEDMAN & MARKS,
Defendants-Third Party Plaintiffs,

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant, Respondent.

INDEX.

	PAGE
Opinion of Appellate Court of Illinois, First District	1
Opinion of Supreme Court of Illinois	23
Order Denying Petitions for Rehearing	35

BLEED THROUGH

APPENDIX.

FRANK GATTO, Adm'r of the Estate of Sophie Gatto *et al.*, Plaintiffs and as Assignees of Third-Party Judgment-Appellees-Respondents, *v.* WALGREEN DRUG CO. *et al.*, Defendants-Third-Party Plaintiffs and Assignors of Third-Party Judgment-Appellees-Respondents—(CALUMET FLEXICORE CORPORATION, Third-Party Defendant-Appellant-Petitioner.)

(No. 59794; Order reversed and cause remanded.)

First District (1st Division)—August 19, 1974.

Rehearing denied November 4, 1974.

1. APPEAL AND ERROR (§ 711)—*matter of jurisdiction is always open.*

Matter of jurisdiction is always open, and the Appellate Court may of its own motion dismiss an appeal where want of jurisdiction appears.

2. JUDGMENTS (§ 151)—*section 72 petitions are necessarily limited.*

Motions seeking relief from final judgments, which are made after expiration of the 30-day period prescribed in the Civil Practice Act, are necessarily limited to the section of the Act providing for relief as petition filed not later than two years after the entry of such judgments, and must be construed as an attempt to use such section (Ill. Rev. Stat. 1971, ch. 110, par. 72).

3. APPEAL AND ERROR (§ 1065)—*reviewing court will not consider appeal from order filed before statutory period allowed for filing notice of appeal.*

Where a single notice of appeal, directed to two separate appealable orders, was filed after the 30-day statutory notice period from the first of such orders but within the statutory notice period from such second order, Appellate Court would hold that it had no jurisdiction to consider the appeal from the first such order, and would proceed with the appeal from the second order (Supreme Court Rule 303(a)).

4. INDEMNITY (§ 8)—*liability of indemnitor is equal to and coextensive with that of indemnitee.*

Where a judgment in favor of plaintiff against a defendant tort-feasor is reversed, an accompanying judgment for indemnity in favor of the defendant, as third-party defendant, against a third-party defendant must also be reversed as it is dependent upon the outcome of the case-in-chief, for liability of the indemnitor is equal to and coextensive with that of the indemnitee.

5. INDEMNITY (§ 8)—*when court should have been given access to agreement between parties which operated to limit maximum liability.*

Courts having responsibility of insuring justice and fairness to parties, in injury and loss of consortium action, including third-party defendant who was indemnitor of defendants third-party plaintiffs, should have been given access to the agreement between plaintiffs and said defendants which operated to limit maximum liability of said defendants for plaintiffs' claims to the $80,000 paid to the plaintiffs thereunder.

6. PROCESS (§ 77)—*courts of record have power over their process.*

Courts of record have power over their process and such courts will recall their process and quash the same, when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced.

7. JUDGMENTS (§ 386)—*execution of judgment limited in accord with agreement between parties executed prior to entry of judgment.*

In exercise of inherent power of court execution of judgment in the sum of $120,000 obtained in favor of defendants on their counterclaim against third-party defendant who was indemnitor of such defendants would be limited to $80,000, where plaintiffs, in injury and loss of consortium action, who obtained judgment against said defendants in the sum of $120,000, had by agreement executed prior to such judgment and by acceptance of $80,000, as consideration thereunder limited said defendants' maximum liability on plaintiffs' claims to the $80,000 so received.

8. INTEREST (§ 68)—*when interest will be computed from date of disclosure of agreement not to execute.*

Opinion which provided for accrual of interest upon judgment "in accordance with law" modified on rehearing to provide for accrual of interest from the date of disclosure of terms of agreement not to execute and not from date of entry of judgment because award of interest from date of judgment would be rewarding concealment as judgment debtor lacked knowledge as to amount required to be paid pursuant to statute to stop accrual of interest during pendency of appeal prior to the time terms of agreement were disclosed (Ill. Rev. Stat. 1973, ch. 74, par. 3).

Appeal from the Circuit Court of Cook County; the HON. MEL R. JIGANTI, *Judge*, presiding.

Peterson, Ross, Rall, Barber & Seidel, of Chicago (Thomas K. Peterson, Robert S. Milnikel, and William W. Jones, of counsel), for Calumet Flexicore Corp.

Moriarty, Rose & Hultquist, Ltd., of Chicago (Maurice James Moriarty and Robert C. Hultquist, of counsel), for Walgreen Drug Co.

MR. JUSTICE GOLDBERG delivered the opinion of the court:

This opinion presumes that the reader is familiar with the previous opinion of this court in this same litigation. (*Gatto* v. *Curtis*, 6 Ill. App. 3d 714, 286 N. E. 2d 541, *leave to appeal denied*, 52 Ill. 2d 597.) In December of 1972, after conclusion of all appellate procedure, Calumet Flexicore Corporation (Calumet) petitioned the trial court for relief from the judgment for indemnity theretofore recovered against it by the owners of the beneficial interest in the land trust which held legal title to the property in question (collectively referred to in our previous opinion as "Lessors") which was assigned to plaintiffs. Thereafter a series of petitions, motions and amendments, which will be described later in this opinion as required, were filed. All of these legal maneuvers, and many hearings before several judges of the circuit court, resulted in a stay of execution upon the judgment and in the entry of two orders; one on June 1, 1973, which denied petitions and motions theretofore filed by Calumet for vacation of the judgment against it, and another on August 21, 1973, which denied Calumet's motion to limit execution. Calumet has appealed from both of these orders.

No evidence was heard by the trial court although numerous affidavits and other documents were filed. In our opinion, the taking of evidence is not required for decision of the issues properly before us. Before stating the contentions of the parties in their briefs in this court, we will review and summarize the massive and repetitious record. We will attempt to confine this

BLEED THROUGH

statement to material matters so that the reader of this opinion will not be confronted with the manifold difficulties encountered by the writer. Perhaps the subheadings will assist in presentation of the pertinent issues.[1]

I.

Previous Motions in the Appellate Court.

Our former opinion, filed June 26, 1972, noted the suggestion of the death of plaintiff, Sophie Gatto, on January 17, 1970. The same motion by the surviving plaintiff which made this suggestion set forth that Lessors had assigned the judgment which they had recovered against Calumet, in the amount of $120,000, to plaintiff. The parties to the assignment had agreed that if the judgment against Calumet was affirmed on appeal, $60,000 thereof would be paid to the Lessors plus one-half of the expenses of the appeal. In addition, there was a substitution of attorneys so that Lessors were represented in the initial appeal by the same counsel who represented the plaintiffs. (Moriarty, Rose & Hultquist, Ltd.) See 6 Ill. App. 3d 714, 720, 721.

On July 17, 1972, Calumet filed in this court a motion to reduce the third-party judgment against it to $60,000, which sum was described as being the amount which the Lessors paid to plaintiffs in release and discharge of their obligation under the judgment. This motion was supported by an affidavit by one of the trial attorneys for Calumet. It stated that on July 6, 1972, he had been told in a telephone conversation with one of the trial attorneys for plaintiffs, that prior to the death of plaintiff, Sophie Gatto, the judgment of plaintiffs against the Lessors was satisfied for the sum of $60,000. The affidavit further stated that one of the trial attorneys for the Lessors had refused to provide any information. Attorneys for plaintiff

1. The original plaintiffs involved in this litigation were Sophie Gatto and Frank Gatto, her husband. The former died on January 17, 1970. The latter became administrator of her estate. He is now the sole plaintiff, individually and as such administrator. This opinion will use singular and plural forms of plaintiff as required.

filed a response to this motion including an affidavit which set forth a totally different version of the telephone conversation. This affidavit stated that the assignment of judgment contained the full and complete agreement between plaintiffs and the Lessors. On August 3, 1972, this court ordered that the motion to reduce the judgment "be denied without prejudice and with the suggestion that this motion be presented to and acted upon by the Trial Court."

II.

Calumet's Petitions For Stay Of Execution, Etc.

On December 8, 1972, Calumet filed its petition for stay of execution in the trial court. This alleged that, despite repeated requests, opposing counsel representing plaintiff and the Lessors had refused to disclose to Calumet the details of the settlement agreement and arrangement between them other than the assignment of judgment. Calumet prayed a stay of execution pending determination of the questions of fact surrounding this situation. Plaintiff filed a motion to dismiss this petition, raising the point that the petition was barred by limitations. Ill. Rev. Stat. 1971, ch. 110, par. 72.

On December 13, 1972, Calumet filed a petition for reduction of the judgment against it to the amount actually paid to plaintiffs on behalf of the Lessors, for stay of execution and for leave to engage in discovery proceedings. This petition was expressly predicated upon section 72 of the Civil Practice Act and claimed fraudulent concealment from Calumet as the basis for delay in seeking relief. Ill. Rev. Stat. 1971, ch. 110, par. 72(3).

On January 19, 1973, Calumet filed an amended motion and a lengthy amended petition. This petition also prayed for discovery, for relief under section 72 of the Civil Practice Act and for partial satisfaction of the judgment against it to conform to the amount actually paid by Lessors to plaintiff.

BLEED THROUGH

III.

Subsequent Proceedings And The Agreement Not To Execute, Dated August 1, 1969.

After the filing of the above pleadings, which included a large number of exhibits such as other motions, affidavits and even briefs, which need not be described in detail, a lengthy hearing was conducted by the trial court on February 15, 1973. After studying the pleadings and all other matters and hearing argument of counsel, the court announced that he would enter an order granting counsel for Calumet the right to take depositions of certain parties on written interrogatories.

On February 22, 1973, before the court had entered any order, counsel for plaintiff communicated with the attorney for Calumet, and with the trial judge. The lawyers met for a conference with the judge. Counsel for plaintiff there tendered to the attorney for Calumet a copy of a five-page agreement handprinted on legal size ruled paper of the type frequently used by attorneys, signed by plaintiffs Frank Gatto and Sophie Gatto, now deceased, and having their signatures on the margin of each page. The agreement was witnessed by two trial attorneys for plaintiffs. The agreement is dated August 1, 1969, which was a Friday. The trial of the original action in the circuit court had commenced on Monday, July 28, 1969, and the cause remained on trial until judgment was entered on the jury's verdicts on Wednesday, August 13, 1969.

This agreement provided that in consideration of the sum of $80,000, receipt of which was acknowledged by Frank and Sophie Gatto, from the Lessors, said plaintiffs agreed not to execute on any judgment against the Lessors rendered in the cause then on trial, or in subsequent litigation involving the same occurrence, in any amount in excess of $80,000. Plaintiffs also acknowledged receipt of $15,000 paid by other defendants

Louis F. Sladky and others, lessees of the involved premises, in consideration of which plaintiffs agreed not to execute in any amount in excess of $15,000 against these defendants.

The agreement further recited the pendency of third-party actions and counterclaims brought by both of said groups of defendants and provided that in the event of recovery by the Lessors in such proceedings, whether in excess of or less than $80,000, any amount up to and including $80,000 should become the property of the Lessors, or the entity which had advanced $80,000 to plaintiffs, and any amount in excess should be paid to plaintiffs. A similar covenant was stated regarding payment by the lessees to plaintiffs. The agreement also provided that if judgments were rendered in such third-party action, or counterclaims, the respective defendants had the option of collecting the judgment themselves, or permitting plaintiffs to do so at their own expense.

The agreement also contained a paragraph which was deleted therefrom. This deletion was acknowledged by the signatures of the trial attorneys for plaintiffs, for the Lessors and for the lessees, Louis F. Sladky and other defendants. (The jury had returned a verdict in favor of the lessees, Sladky, *et al.*, and against plaintiffs.)

The record shows that the sum of $80,000 mentioned in the agreement was actually paid to plaintiffs or their attorneys. A copy of the insurance draft by which this was accomplished was produced before the trial judge.

IV.

Plaintiff's Motion for Summary Judgment On Calumet's Second Amended Petition.

The above itemization of pleadings filed is not yet complete. On March 16, 1973, plaintiff filed a motion for summary judgment. This motion set forth that the attorney for Calumet had

BLEED THROUGH

knowledge of the payment made during trial and knew the exact amount of that payment more than 2 years prior to the filing of his petition in this proceeding. The motion prayed for summary judgment on the ground that there was no issue of fact between the parties but that the limitation period contained in section 72 of the Civil Practice Act had expired. On April 13, 1973, Calumet filed a reply to this motion in which knowledge of the payment was denied and the allegation was made that counsel for plaintiff had repeatedly refused to furnish the necessary information. The reply further set out that the proceeding was not brought under section 72 of the Civil Practice Act, the facts surrounding the transaction were fraudulently concealed and discovery proceedings were required.

In addition, On April 13, 1973, with leave of court, Calumet filed a second amended petition. This document alleged that the agreement between plaintiffs and the Lessors had been fraudulently concealed so that the entire initial jury trial "was a sham and a charade" and the resulting verdict and judgments were void, thus making the third-party judgment against Calumet also void. Calumet prayed for vacation of the judgments against the Lessors and of the third-party judgment in favor of the Lessors and against Calumet, for dismissal of the original and third-party complaints and for full discovery. Calumet further requested relief by way of an order for the attorneys for plaintiff and the Lessors to respond to the petition in their individual capacities; for taxation of all attorneys' fees, costs and other expenses incurred by Calumet against the attorneys; for exemplary damages; and for full discovery.

V.

The Final Order Of June 1, 1973.[2]

After hearing argument of counsel and having examined briefs and other documents, the court entered the final order on June

2. The record indicates that this order may have been entered on June 4, 1973. However, to avoid confusion we will follow the example of both counsel and use the date of June 1, 1973.

1, 1973, disposing of Calumet's second amended petition to vacate the judgments and for other relief. The court found that there was nothing to indicate that the petition came within section 72(3) of the Civil Pratice Act, providing that time be tolled because of fraudulent concealment, but that the court had jurisdiction "to determine the exact amount of the judgment" and it was necessary in making that determination to examine the legal effect of the agreement not to execute and the assignment of judgment. The court accordingly ordered that plaintiff's motion for summary judgment was taken as a response to Calumet's second amended petition but was not ruled upon because considered moot; the petition for vacating the judgments and dismissing plaintiff's complaint and the third-party complaint against Calumet was denied; the petition for discovery and for imposition of sanctions against those persons alleged to have participated in the purported scheme to defraud Calumet was denied; the petition requiring various parties and corporations to respond thereto was denied; the petition for an order taxing, as damages, various claimed costs and expenses sustained by Calumet was denied; the petition for further relief was also denied. The order directed that the stay of execution remain in effect until further order of the court. Calumet was granted leave to file its motion to limit the amount for which plaintiff may execute and plaintiff was directed to file responsive pleadings thereto with the cause being set for later hearing.

VI.

Calumet's Motion To Limit Execution
And Motion Of Plaintiff To Dismiss.

On June 15, 1973, Calumet filed a motion to limit execution. This lengthy motion reargued the entire matter including a citation of legal authorities. In effect, it moved the court to fix the amount to be paid in full satisfaction of the third-party judgment against Calumet and to limit execution or other process to the amount thus found due.

BLEED THROUGH

On July 2, 1973, plaintiff filed a motion to dismiss this motion.[3] This document discussed the legal authorities cited by Calumet and prayed that the motion be denied primarily for lack of jurisdiction. On July 9, 1973, Calumet filed a reply to this motion to dismiss the previous motion of Calumet. This document is primarily a repetition of the arguments already made by Calumet.

VII.

The Memorandum Opinion by the Trial Court.

On July 31, 1973, after another lengthy hearing, the trial court filed a memorandum opinion which entered into a careful analysis of the matter before the court. It concluded that Calumet's motion to limit execution did not come within Section 72 of the Civil Practice Act since it was a proceeding concerning satisfaction of the judgment as distinguished from motions to modify the judgment which were theretofore denied. The learned trial judge then analyzed the agreement not to execute in the light of the opinion of the Supreme Court in *Reese* v. *Chicago, B. & Q. R. R. Co.*, 55 Ill. 2d 356, 303 N. E. 2d 382, which had been filed a short time previously, on June 25, 1973. The memorandum opinion found that there was no prejudice or fraud against Calumet in the original trial and that no specific charges of fraud had ever been made concerning defects in the trial. The memorandum accordingly adopted the rationale of *Reese*, held the agreement not to execute valid and denied Calumet's motion.

---

3. This "motion to dismiss" actually consists of objections by plaintiff to the motion of defendant. We are aware of no statute or other legal authority which authorizes a "motion to dismiss" a previous motion.

VIII.

The Final Order of August 21, 1973.
Calumet's Notice of Appeal Filed
September 13, 1973.

On August 21, 1973, Calumet filed a lengthy motion for rehearing or for clarification of the memorandum opinion. On August 21, 1973, the court entered a formal order denying Calumet's motion to limit execution in accordance with the memorandum opinion. On September 13, 1973, Calumet filed its notice of appeal praying reversal of the orders of June 1, 1973, and August 21, 1973.

IX.

Contentions by the Parties in This Court.

Calumet contends that the trial court had a duty to inquire and to allow inquiry by Calumet into the merits of the allegations of fraud before exercising its jurisdiction to deny relief. This is supported by the corollary proposition that in the absence of a justiciable controversy a trial is a fraud upon the court. Calumet also urges that if execution on the judgment against it is to be allowed, the trial court erred when it denied the motion to limit execution. In response, plaintiff contends that the agreement dated August 1, 1969, as amended by the assignment of judgment dated January 27, 1970, is a loan agreement of the kind held proper by the Supreme Court of Illinois. This contention is supported by two corollary principles that the parties intended a loan agreement as distinguished from a settlement and the execution of this type of agreement does not require dismissal of the lender. Plaintiff also urges that the record is devoid of evidence that the agreement of August 1, 1969, or the assignment of judgment affected the judgments entered against Calumet; there is no evidence of fraudulent concealment which would constitute the type of extrinsic fraud which would prevent the

BLEED THROUGH

court from acquiring jurisdiction and would constitute grounds for vacating the judgment. Plaintiff finally urges that Calumet has waived its right to argue matters relating to alleged fraudulent concealment since the trial court's order of June 1, 1973 was final and appealable and the only remedy available to Calumet is found in section 72 of the Civil Practice Act.

X.

Opinion.

We are required at the outset to solve a jurisdictional problem. As above noted, the trial court's order of June 1, 1973, disposed of all prior pleadings by Calumet (to and including the second amended petition filed April 13, 1973) insofar as they sought relief initially predicated upon vacation of the judgment against Calumet. The order entered August 21, 1973, denied the written motion of Calumet to limit execution. Calumet filed its notice of appeal on September 13, 1973. This notice prayed for reversal of both orders. The notice was filed within 30 days after the second order but far in excess of 30 days after the earlier order. See Supreme Court Rule 303(a), 50 Ill. 2d R. 303(a).

• 1 Plaintiff filed in this court a motion to dismiss the appeal based upon the tardiness of the notice of appeal with reference to the order of June 1, 1973. Calumet responded. Upon due deliberation, we denied this motion. The point is now urged again in plaintiff's brief and there is a full response in the reply brief of Calumet. In our opinion, as this court has quite recently held, the matter of our "jurisdiction is *always* open, and the court may of its own motion dismiss an action where want of jurisdiction appears." *Weber* v. *Northern Illinois Gas Co.*, 10 Ill. App. 3d 625, 629, 295 N. E. 2d 41, citing *Village of Glencoe* v. *Industrial Commission*, 354 Ill. 190, 188 N. E. 329.

After examination of the record and briefs, we have concluded that we have no jurisdiction regarding the attempted appeal

from the order of June 1, 1973, but we do have jurisdiction as regards the appeal from the order of August 21, 1973.

As shown, the two orders dealt with diametrically different categories of relief. The order of June 1, 1973, decided only matters raised in petitions and motions which would be cognizable under section 72 of the Civil Practice Act. The order of August 21, 1973 dealt with a type of relief involving the inherent power of the court to control and deal with its own process. Since the attempt to vacate the judgment was not made until far more than 30 days after the rendition thereof, the petition necessarily constituted a new action under the authority of section 72. This conclusion followed regardless of the label affixed to any or all of these petitions, although in certain instances relief was specifically claimed under section 72.

• 2 In this regard, it is apparent that section 72 of the Civil Practice Act is intended to eliminate all previously existing remedies for obtaining relief from final judgments more than 30 days after their entry. Thus, it has been held that motions seeking relief from final judgments, which are made after expiration of the 30-day period stated in the Civil Practice Act, are necessarily limited to section 72 and must be construed as an attempt to use this section. *Schuman* v. *Department of Revenue*, 38 Ill. 2d 571, 573, 232 N. E. 2d 732; *Trisko* v. *Vignola Furniture Co.*, 12 Ill. App. 3d 1030, 1033, 299 N. E. 2d 421, and *Mehr* v. *Dunbar Builders Corp.*, 7 Ill. App. 3d 881, 883, 289 N. E. 2d 25.

• 3 Since all of the proceedings taken prior to June 1, 1973, and disposed of by the order entered on that day, were under the legal authority of section 72 of the Civil Practice Act, the order of June 1, 1973, was necessarily final and appealable. Rule 304(b)(3) of the Supreme Court (50 Ill. 2d R. 304(b)(3)) specifically makes appealable, without special finding of any kind, "A judgment or order granting or denying any of the relief prayed in a petition under section 72 of the Civil Practice

BLEED THROUGH

Act (Ill. Rev. Stat., ch. 110, § 72)." The notice of appeal filed September 13, 1973, was impotent to vest jurisdiction in this court for review of the order of June 1, 1973. In this regard, the situation presented here by the filing of one notice of appeal directed to two separate orders is analogous to the situation in *Weber* v. *Northern Illinois Gas Co.*, 10 Ill. App. 3d 625, 295 N. E. 2d 41, in which this court dismissed an attempted appeal involving one count of a complaint and proceeded with the appeal involving the other count. We arrive at a similar decision here and hold that we have no jurisdiction to consider any of the issues raised by Calumet in the attempted appeal from the order of June 1, 1973.

We have jurisdiction over the issues raised by the notice of appeal from the order entered August 21, 1973, which denied the motion of Calumet to limit execution. This inquiry involves, first, the legal issues surrounding the question of the validity and effect of the agreement not to execute. We have above summarized the provisions of this agreement entered into on August 1, 1969, between plaintiffs and the Lessors and witnessed by their respective attorneys. Ascertainment of the legal effect of this agreement requires analysis of *Reese* v. *Chicago, B. & Q. R. R. Co.*, 55 Ill. 2d 356, 303 N. E. 2d 382.

In *Reese*, plaintiff brought suit against the Railroad and Koehring Company. The case against the Railroad was based upon the Federal Employers' Liability Act. Plaintiff sought to impose strict liability upon Koehring, the manufacturer of an allegedly defective crane. The Railroad filed a counterclaim against Koehring for indemnity. Immediately before trial, plaintiff and the Railroad executed an agreement. The Railroad loaned plaintiff $57,500 which she promised to pay, without interest, from any judgment that she would be legally entitled to collect against Koehring. The obligation to repay the loan attached only to the first $57,500 thus to be collected and not to any amount in excess thereof. On plaintiff's motion, the Railroad was then dismissed as party defendant without prejudice. After

trial by the court, judgment was entered against Koehring for $149,000 and in favor of Koehring on the counterclaim by the Railroad. The trial court ruled that the loan agreement was actually a covenant not to sue and deducted the amount of the loan from plaintiff's judgment. This court (Second District) held to the contrary and differentiated the loan agreement from a covenant not to sue. The court held that effect should be given to the "plain terms" of the loan agreement. (5 Ill. App. 3d 450, 456, 457.) The supreme court affirmed this result.

In the case before us, plaintiffs agreed that they would not execute on any judgment against the Lessors in excess of $80,000. The first $80,000 which might be recovered from any judgment was to be paid directly to the Lessors but any amount in excess thereof would become the property of plaintiffs. There are, however, significant and governing distinctions between the case before us and *Reese*. In *Reese*, as in the instant case, the agreement was between plaintiff and an alleged tort-feasor who was a party defendant to plaintiff's suit. In *Reese*, the contracting defendant was dismissed and plaintiff was left to pursue her remedy against the remaining defendant. In the case at bar, plaintiffs had no direct cause of action against Calumet, which had not been joined as a party defendant to their complaint. The sole and only liability sought to be enforced against Calumet is that of a third-party defendant indemnitor under a theory of active-passive negligence and the attempted imposition of this liability was invoked by a third-party plaintiff. Thus, in *Reese*, the two parties involved with plaintiff were codefendants. In the instant case, the two parties are not codefendants but occupy the legally separate relationship of indemnitor and indemnitee.

Furthermore, in *Reese*, after trial there was a judgment holding Koehring not liable as indemnitor. In the case before us, the jury found against Calumet as indemnitor and in favor of the Lessors as indemnitees and that judgment has been affirmed by this court with approval of that ruling by the highest court

BLEED THROUGH

in Illinois. In *Reese*, there was no limitation, beyond adequacy of damages, upon the amount which plaintiff could recover from Koehring as a party defendant. In the case before us, the relation between Calumet and the Lessors, being solely one of indemnity, necessarily limited the liability of Calumet to the amount of the liability actually imposed upon the Lessors as third-party plaintiffs-indemnitees.

The above discussion regarding Reese is equally valid and applicable to other cases dealing with so-called loan agreements such as *American Transport Co.* v. *Central Indiana Ry. Co.*, 255 Ind. 319, 264 N. E. 2d 64, and *Northern Indiana Public Service Co.* v. *Otis*, 145 Ind. App. 159, 250 N. E. 2d 378. Regardless of the degree of congruity between the agreement before us and those in *Reese* and the other cited cases, the particular legal relationship existing between the parties here prevents imposition upon Calumet of any liability greater than that assumed and discharged by its indemnitee. The liability of the indemnitor is necessarily equal to and coextensive with that of the indemnitee.

• 4 In situations in which a judgment in favor of plaintiff against a defendant tort-feasor is reversed, it follows necessarily that an accompanying judgment for indemnity in favor of this defendant, as third-party plaintiff, against a third-party defendant must also be reversed,, "* * * as it is dependent upon the outcome of the case in chief." (*Jones* v. *S. S. & E. Corp.*, 112 Ill. App. 2d 79, 97, 98, 250 N. E. 2d 829, citing *Bohannon* v. *Ryerson & Sons, Inc.*, 15 Ill. 2d 470, 475, 155 N. E. 2d 585.) In situations in which the judgment against a third-party defendant, who is the indemnitor, is less than the judgment against the defendant (third-party plaintiff) who is the indemnitee, the amount of recovery against the third-party defendant is properly increased so as to accomplish complete indemnity. (*Deel* v. *United States Steel Corp.*, 105 Ill. App. 2d 170, 185, 245 N. E. 2d 109.) The very essence of indemnity is to hold the indemnitee harmless. As a result of the application of the

theory of indemnity, he should be relieved completely from his liability but he should not be permitted to make a profit at the expense of the indemnitor.

The agreement to limit execution which is before us thus necessarily presents, in the results which flow from its execution and performance, at least some aspects of a settlement and release between plaintiffs and Lessors. Execution of the agreement and payment of the consideration of $80,000 by the Lessors thereunder operated to place a maximum limit upon the liability of the Lessors to plaintiffs. Under no circumstances, and regardless of any verdict that the jury might return, could Lessors be made liable to plaintiffs for a greater amount. Nor does the assignment to plaintiffs of the judgment in favor of the Lessors and against Calumet operate to modify this situation. This assignment represents merely an ill-conceived and abortive attempt to fasten a direct tort liability upon Calumet where no such claim was asserted against it and where the sole and exclusive source of its liability was a duty to indemnify. The door should not be opened in this manner so as to saddle an indemnitor with an unfair liability in excess of legal limitations.

We wish to make it clear that, in our opinion, the result above reached that Calumet is equitably entitled to relief concerning the extent of its liability as an indemnitor does not in any manner rest upon prejudice to Calumet during the trial of the action. On the contrary, there was no prejudice to the rights of Calumet during the trial. No situation developed at trial concerning the effect of the agreement upon any person along the lines suggested by the supreme court in *Reese* (55 Ill. 2d 356, 364.) Our previous minute examination of the trial record, without knowledge of the existence of the agreement, impelled us to conclude that the judgment of liability for active negligence was properly entered against Calumet as an indemnitor. (See 6 Ill. App. 3d 714, 731.) We cannot conceive that the agreement itself had any bearing upon this result or any effect upon the trial of the issues between plaintiffs and the Lessors.

BLEED THROUGH

However, substantial prejudice resulted to Calumet in connection with the amount of recovery which is now sought to be enforced against it by execution presently stayed by order of the circuit court. It is manifest that, had the agreement been disclosed to the trial judge upon entry of judgment or at the hearing of the post-trial motion, Calumet would have had a proper hearing and could then have made a timely attempt to reduce the amount of the judgment for indemnity. In our opinion, such a hearing should have resulted in the allowance of proper credit to Calumet as above pointed out.

A study of all of the affidavits filed by both sides in support of various motions and petitions leads to the conclusion that there is a possibility that counsel for Calumet was generally aware of the existence of some arrangement between attorneys for plaintiffs and for the Lessors. However, he did not receive a copy of the agreement until the meeting held in the chambers of the trial court on February 22, 1973. An element which may have been partly responsible for this was the absence of proper contact between the attorneys representing the parties at the trial. There was obviously a mutual breakdown of communication between the opposing attorneys.

• 5 However, we need not decide the extent of the knowledge of Calumet's counsel. The important and decisive element is that it is clear and certain that this agreement was not disclosed to any of the courts involved in this proceeding until February 22, 1973, virtually 3 years and six months after its execution. The agreement was not disclosed to the trial judge who presided over the original jury trial, to this court on the first appeal, to the Supreme Court in connection with the petition for leave to appeal and in other matters brought before it, or to any of three trial judges who heard some portions of the subsequent proceedings. The only portion of the transaction between these parties ever disclosed to any court until February 22, 1973, was the assignment of judgment which was entered into on January 27, 1970. The courts having the responsibility of insuring

justice and fairness between these parties should have been given access to this agreement. See *People* v. *Burr*, 316 Ill. 166, 182, 147 N. E. 47. See also *People* v. *Sleezer*, 8 Ill. App. 2d 12, 22, 23, 130 N. E. 2d 302, quoting extensively from *Burr*.

• 6 The only remaining issue goes to the manner in which the equitable relief of conforming its liability to true legal indemnity should be granted to Calumet. The question here does not involve vacation of a judgment or any additional relief commencing from this. The requested relief involves simply control by the court over its own process. In considering the legality of a rule of practice of the municipal court of Chicago concerning the issuance of a *capias*, this court stated the principle in one sentence: "A court always has control of its own process." (*Wilson* v. *Gill*, 279 Ill. App. 487, 491.) In *People ex rel. Mikel* v. *Illinois Racing Commission*, 310 Ill. App. 68, 72, 33 N. E. 2d 893, this court cited with approval the statement of the principle made in *Sandburg* v. *Papineau*, 81 Ill. 446. In *Sandburg*, the supreme court made a clear statement of the applicable theory (81 Ill. 446, 448-449):

> "There is no principle of law better recognized than that which gives to courts of record power over the process of their courts. It is essential to the administration of justice, and it by no means depends upon statutory enactment, but the power is coeval with the common law courts; and such courts will recall their process and quash the same, when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced. If a judgment were satisfied, and, through mistake or by design, an execution were to issue upon it, does any one suppose the court from which it issued is powerless to recall and quash it? Or if it was only partially satisfied, and an execution were to issue for the full amount of the judgment, would any one have the hardihood to say that the court could not order the credit to be indorsed on the execution? So the court has power, in all cases, to compel credits on judgments or executions, where it would be illegal or inequitable to proceed to collect the amount

BLEED THROUGH

> claimed. A court of justice will never permit a plaintiff, simply because he has acquired an unjust advantage by obtaining an execution, to retain and enforce it."

Perhaps the strongest additional and more recent authority bearing upon this situation is *Weaver* v. *Bolton*, 61 Ill. App. 2d 98, 209 N. E. 2d 5. There, plaintiff Weaver filed suit for personal injuries against Bolton and Andrew. She also sued the Giuseppe Verdi Society for Dram Shop Act violation in connection with intoxication of Bolton. Before trial plaintiff settled with the Society for $8000 and gave a covenant not to sue. All of the parties knew this. After trial, plaintiff recovered a judgment against Bolton for $20,000 and against Andrew for $10,000. After denial of post-trial motions, and more than 30 days after the judgments, Andrew filed a petition for credit of $8000 on the judgment against him. The trial court granted the credit but the order was reversed by this court (Second District). The court held that the petition for credit was not properly filed by Andrew under section 72 of the Civil Practice Act because he had full knowledge of the settlement before the entry of judgment and failed to advise the court of this. Consequently he had failed to exercise due diligence and his petition under section 72 could not be used to grant relief. The court then made the following statement which is most applicable to the case at bar (61 Ill. App. 2d 98, 105):

> "This does not mean, however, that the trial court was without jurisdiction to hear such petition. It had authority to make such orders and issue writs as were necessary to carry its judgments into effect and to render them operative. This power continued in the court until its judgments were satisfied, and the present proceeding pertained to the satisfaction of these judgments rather than their modification as that term is generally understood. Many such questions arise subsequent to judgment in which jurisdiction is to be exercised."

The decision in *Virginia* v. *West Virginia*, 246 U. S. 565, 591, 62 L. Ed. 883, 38 S. Ct. 400, cited by the appellate court immediately following the above excerpt teaches us. "That judi-

cial power essentially involves the right to enforce the results of its exertion is elementary." Proceeding to exercise its jurisdiction over process and the execution thereof, completely aside from section 72, the court held that the assumption was proper, that the injuries caused by both defendants were several and, accordingly, that defendant Andrew should not have the benefit of the credit. The order granting credit was reversed and the cause remanded with directions that execution issue against Andrew in the full sum of $10,000.

To paraphrase the matter, in the situation here involved, the amount of the execution to be issued upon this judgment is subject to the legal and equitable control of the court. This inherent power of the court may be exercised in response to Calumet's petition for limitation of execution filed June 15, 1973. The relief granted here has no relation to the amount of the undisturbed judgment against Calumet but will operate upon the process of the court to be issued in connection with enforcement of the judgment.

• 7 Our heritage of wisdom teaches us that to every thing there is a season and "a time to every purpose." This record convinces us that the time and the season for ending this litigation have truly come to pass. We abstain from review of the order of June 1, 1973, for lack of jurisdiction. The order of August 21, 1973, which denied relief to Calumet, is reversed and the cause is remanded with directions for the entry of a proper order directing the clerk of the circuit court of Cook County to limit execution on the judgment entered August 13, 1969, in favor of the Lessors (subsequently assigned to Frank Gatto and the late Sophie Gatto) and against Calumet Flexicore Corporation to $80,000 which said execution when issued by the clerk may also provide for properly taxable costs and interest in accordance with law.

Order of August 21, 1973, reversed and cause remanded with directions.

EGAN *P. J.*, and BURKE, *J.*, concur.

BLEED THROUGH

SUPREME COURT OF ILLINOIS.

Sept. 26, 1975.

Rehearing Denied Nov. 21, 1975.

FRANK GATTO, Individually and as Adm'r,

Appellee,

vs.

WALGREEN DRUG COMPANY et al.

Appeal of CALUMET FLEXICORE CORPORATION,

Third-Party Defendant.

No. 47187.

Third-party defendant which had been found liable, as indemnitor, to defendants appealed from orders of the Circuit Court, Cook County, Mel R. Jiganti, J., denying petitions seeking vacation of judgments and limitation of amount for which plaintiffs could execute. The Appellate Court, Goldberg, J., 23 Ill. App. 3d 628, 320 N. E. 2d 222, reversed and remanded with directions and leave to appeal was granted. The Supreme Court, Schaefer, J., held that after defendant lessors agreed to pay plaintiffs $80,000 as a "purchase of peace," there was no longer any controversy remaining between them, defendants no longer had claim for third-party indemnification in any amount in excess of $80,000, no justiciable matter existed between plaintiffs and defendant and third-party defendant was entitled to relief from judgment in amount of $120,000 against it.

Judgments reversed.

1. Appeal and Error

Section of Civil Practice Act relating to relief from judgment does not make immediately and separately appealable every order that disposes of any portion of total relief sought. Supreme Court Rules, rule 304(a, b), (b)(3), S. H. A. ch. 110A, § 304 (a, b), (b)(3); S. H. A. ch. 110, § 72(6).

2. Appeal and Error

Where trial judge stated that, if case was going to be appealed, it would be done in one package and appellate court would make all determinations necessary and order continuing stay of execution granted one defendant leave to file motion to limit execution and continue cause, the order became appealable only when entire cause was disposed of, so that Supreme Court had jurisdiction to review the order when timely appeal was taken following disposition of the case, even though the appeal was taken more than 30 days after the order was entered. Supreme Court Rules, rule 304(a, b), (b)(3), S. H. A. ch. 110A, § 304(a, b), (b)(3); S. H. A. ch. 110, § 72(6).

3. Compromise and Settlement
Indemnity
Judgment

After defendant lessors agreed to pay plaintiffs $80,000 as a "purchase of peace," there was no longer any controversy remaining between them, defendants no longer had claim for third-party indemnification in any amount in excess of $80,000, no justiciable matter existed between plaintiffs and defendant and third-party defendant was entitled to relief from judgment in amount of $120,000 against it.

A. R. Peterson, Thomas K. Peterson, and William W. Jones, Chicago (Peterson, Ross, Rall, Barber & Seidel, Chicago, of counsel), for appellant.

BLEED THROUGH

Moriarty, Rose & Hultquist, Ltd., Chicago (Maurice James Moriarty, and Robert C. Hultquist, Chicago, of counsel), for appellee.

SCHAEFER, *Justice.*

Sophie Gatto was injured on June 19, 1964, when the roof of a Walgreen Drug Store in Cook County collapsed. She sued for personal injuries and her husband, Frank Gatto, sued for loss of consortium. A number of parties were joined as defendants, including the owners of the beneficial interest in the land trust which held title to the property [Lessors] and Louis Sladky, the lessee of the drug store. By their third amended complaint the plaintiffs attempted to join Calumet Flexicore Corporation [Calumet], the company which had installed the roof, as a defendant, but the statute of limitations had run. The Lessors, however, brought in Calumet as a third-party defendant. The jury returned a verdict in favor of Sophie Gatto for $100,000 and Frank Gatto for $20,000, against the Lessors. In addition, the jury returned a verdict of $120,000 in favor of the Lessors and against Calumet.

Calumet appealed from the judgment against it; on January 27, 1970, during the pendency of the appeal, the Lessors assigned their judgment against Calumet to the plaintiffs, Frank and Sophie Gatto. By the terms of the assignment the judgment for $120,000 against Calumet was assigned to the Gattos, and in exchange the Gattos promised that if the judgments were affirmed on review, they would pay $60,000 to the Lessors. At that time there was a substitution of attorneys, and the Lessors were represented on appeal by the same attorneys who represented the plaintiffs. The appellate court affirmed the judgments in an opinion filed on June 26, 1972. *Gatto* v. *Curtis,* 6 Ill. App. 3d 714, 286 N. E. 2d 541.

In July, 1972, Calumet moved in the appellate court to reduce the third-party judgment against it to $60,000. The motion was supported by an affidavit which stated that Calumet's attorney had learned, through a telephone conversation with one

of the attorneys for the plaintiffs and Lessors on July 6, 1972, that the judgment in favor of the plaintiffs and against the Lessors had been satisfied for $60,000, so that the liability of Calumet as an indemnitor should have been limited to that amount. The attorneys for the plaintiffs and Lessors filed a response to the motion that included an affidavit which stated that the assignment of the judgment contained the full and complete agreement between the plaintiffs and the Lessors. Calumet's motion was denied without prejudice, with the suggestion that the question be raised in the trial court.

Thereafter, Calumet filed petitions in the trial court which sought a stay of execution, reduction of the judgment and discovery as to whether there had been a settlement agreement other than the assignment of the judgment. These petitions are described more fully in the appellate court opinion (23 Ill. App. 3d 628, 631, 320 N. E. 2d 222). On February 15, 1973, the trial court ruled that discovery would be permitted. On February 22, the attorneys for the plaintiffs and Lessors disclosed, for the first time, an executed settlement agreement dated August 1, 1969. The trial had commenced on Monday, July 28, 1969, and it had continued for two weeks after the settlement agreement, through Wednesday, August 13. The agreement, a five-page handwritten document, provided in part:

"AGREEMENT NOT TO EXECUTE

Dated August 1, 1969

> For and in consideration of the payment of the sum of Eighty Thousand ($80,000.00) Dollars, the receipt of which is hereby acknowledged, the undersigned, Frank Gatto and Sophie Gatto, his wife, individually and as husband and wife, paid by and on behalf of [Lessors], * * * do hereby covenant and agree not to execute on any judgment rendered in the cause now on trial * * * or in any other cause now on file or hereafter filed, arising out of the occurrence of June 19th, 1964, at or near 6865 West 111th Street, Worth, Illinois, in any amount in excess of Eighty Thousand ($80,000.00) Dollars, against the above named defendants.

BLEED THROUGH

Further, for and in consideration of the payment of the sum of Fifteen Thousand $(15,000.00) Dollars, the receipt of which is hereby acknowledged, the undersigned, Frank Gatto and Sophie Gatto, his wife, individually and as husband and wife, paid by and on behalf of [lessee], * * * do hereby covenant and agree not to execute on any judgment rendered in the cause now on trial * * * or in any other cause now on file or hereafter filed, arising out of the occurrence of June 19th, 1964, at or near 6865 West 111th Street, Worth, Illinois, in any amount in excess of Fifteen Thousand ($15,000.00) Dollars, against the above named defendant.

The above payments, and each of them, are made solely as a purchase of peace and are not to be construed as an admission of liability on the part of any of the said defendants.

Inasmuch as each of the above named defendants has now pending in the above-captioned lawsuit actions in the above-captioned lawsuit actions in the nature of Third-Party Actions and Counterclaims against certain other parties in the said lawsuit; now therefore it is agreed as follows:

1. In the event that the above named defendants, [Lessors], * * * shall in any such Third-Party Action or Counterclaim recover a judgment or judgments, and collect same, in excess of Eighty Thousand ($80,000.00) Dollars, or less than Eighty Thousand ($80,000.00), the distribution thereof shall be as follows: (A) any amount up to an [*sic*] including Eighty Thousand ($80,000.00) Dollars shall become and remain the sole property of [Lessors] * * * or the entity having actually paid the aforesaid Eighty Thousand ($80,000.00) Dollars. (B) Any amount in excess of Eighty Thousand ($80,000.00) shall be paid over to the aforesaid plaintiffs.

2. In the event that the above-named defendant, Louis F. Sladky, shall in any such Third-Party Action or Counterclaim recover a judgment or judgments, and collect same, in excess of Fifteen Thousand ($15,000.00) Dollars or less than Fifteen Thousand

($15,000.00) Dollars, the distribution thereof shall be as follows: (A) Any amount up to and including Fifteen Thousand ($15,000.00) Dollars shall become and remain the sole property of Louis F. Sladky, or the entity having actually paid the aforesaid Fifteen Thousand ($15,000.00) Dollars. (B) Any amount in excess of Fifteen Thousand ($15,000.00) Dollars shall be paid over to the aforesaid plaintiffs.

In the event the aforesaid defendants shall be awarded any judgment or judgments in any such Third-Party Action or Counterclaim, said defendants, at their sole option, may:

1. Attempt to collect such judgment or judgments, or

2. Permit plaintiffs, at plaintiffs' expenses, to attempt to collect such judgment or judgments."

After the disclosure of this agreement, Calumet filed a second amended petition on April 13, 1973. This petition alleged that after the agreement was signed there was no longer a "justiciable cause of action to submit to trial, verdict, and judgment. Hence, the trial was a sham and a charade and the resulting verdicts and judgments are void." It alleged further that the plaintiffs and Lessors fraudulently concealed the agreement from Calumet in an attempt to recover judgments not based on lawful claims. The petition sought an order vacating the judgments against the Lessors and Calumet, an order dismissing plaintiffs' complaints against the Lessors and Calumet, discovery to allow the court to impose appropriate sanctions against persons who participated in the scheme to defraud Calumet, an order assessing damages including attorney's fees, and any other relief that justice required.

On the basis of briefs, affidavits, and oral argument, the trial court, on June 1, 1973, entered an order denying all the relief sought in Calumet's second amended petition. This order, however, continued the stay of execution, granted leave to Calumet to file a motion to limit the amount for which plaintiffs could execute, and continued the cause for further order. The motion

BLEED THROUGH

to limit execution was filed by Calumet on June 15. It was denied on August 21, 1973. Calumet filed a notice of appeal on September 13 praying for a reversal of both the June 1 and August 21 orders.

The appellate court held that it had no jurisdiction to consider the June 1 order, on the ground that the notice of appeal had not been filed within 30 days from the entry of that order. The appellate court, however, held that it had jurisdiction to limit execution upon the judgment, and limited execution against Calumet to $80,000. In addition, the court held that interest on the $80,000 would accrue only from the date on which the "Agreement Not to Execute" was disclosed. (23 Ill. App. 3d at 645, 320 N. E. 2d 222.) We granted leave to appeal.

On this appeal, Calumet argues that both the June 1 and August 21 orders were reviewable and that the trial court improperly denied the second amended petition. The plaintiffs and Lessors have cross-appealed arguing that the appellate court erred in limiting execution on the judgment and in accruing interest only from the date of the disclosure of the "Agreement Not to Execute."

The first question to be considered is the correctness of the appellate court's determination that it was without jurisdiction to review the trial court's order of June 1, 1973. In reaching that conclusion the appellate court relied upon Rule 304(b)(3) of the rules of this court. Rule 304(a) provides that if multiple claims are involved in an action, an appeal may be taken from a final judgment disposing of less than all of them only if there is an express written finding by the trial judge that there is no just reason for delaying appeal. Rule 304(b) states: "(b) The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule: * * * (3) A judgment or order granting or denying any of the relief prayed in a petition under section 72 of the Civil Practice Act." Ill. Rev. Stat. 1973, ch. 110A, par. 304.

[1] The appellate court read this provision as intended to make immediately and separately appealable every order that disposes of any portion of the total relief sought under a section 72 petition. The history of the provision demonstrates that that was not its purpose. The Committee Comments on this rule state that subparagraph (3) is derived from paragraph (6) of section 72 of the Civil Practice Act. (Ill. Rev. Stat. 1967, ch. 110, par. 72(6).) Paragraph (6) was added to section 72 of the Civil Practice Act by the amendments of 1955. It provided: "(6) Any order entered *denying* or *granting* any of the relief prayed in the petition is appealable." The Committee Comment was as follows: "Subsection (6). In order to set at rest doubts as to the right of appeal from post-judgment orders, subsection (6) specifically provides that any order, whether denying or granting the relief sought, shall be appealable." (S. H. A. ch. 110, sec. 72, at 287.) And the Historical and Practice Notes to subsection (6) make it clear that the purpose of the provision was to negate decisions that had required the entry of a formal judgment as a prerequisite to appeal, and to allow an appeal from an order denying a section 72 motion. S. H. A. ch. 110, sec. 72, at 291.

In addition to its reliance on Rule 304(b)(3) to justify its denial of jurisdiction, the appellate court said:

> "* * * The notice of appeal filed September 13, 1973, was impotent to vest jurisdiction in this court for review of the order of June 1, 1973. In this regard, the situation presented here by the filing of one notice of appeal directed to two separate orders is analogous to the situation in *Weber* v. *Northern Ill. Gas Co.*, 10 Ill.App.3d 625, 295 N.E.2d 41, in which this court dismissed an attempted appeal involving one count of a complaint and proceeded with the appeal involving the other count." 23 Ill.App.3d at 637-38, 320 N.E.2d at 229.

[2] The appellate court's reliance on *Weber* v. *Northern Illinois Gas Co.* is hard to understand, for in that case there was an express finding by the trial judge that there was no just

BLEED THROUGH

reason for delaying appeal. In the present case, however, it was the stated intent of the trial judge that there should be but one appeal. After he had indicated that he would consider a motion to limit execution, it was suggested that such a motion should be made in the supplementary proceedings when the Gattos were executing on their judgment. The judge rejected this suggestion, stating:

> "* * * if this thing is going to be appealed and you say that, fine. I really don't care. That is not my concern at all. But whatever is going to be done, it is going to be done in one package and going to the Appellate Court, and they are going to make all the determinations necessary."

As has been mentioned, the order of June 1 continued the stay of execution, granted Calumet leave to file a motion to limit execution and *continued the cause for further order.* We believe that the judge's statement, coupled with the terms of his order, shows that he intended that the June 1 order would become appealable only when the entire cause was disposed of. We hold, therefore, that the appellate court did not lack jurisdiction to review the order of June 1.

The question then arises as to whether or not it is necessary to remand the cause to appellate court for that review. We have concluded that it is not. Rule 366 provides:

> "In all appeals the reviewing court may in its discretion. and on such terms as it deems just: * * *
>
> (5) give any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution that the case may require." (Ill. Rev. Stat. 1973, ch. 110(A), par.366.)

In many instances this court, acting under Rule 366, has decided issues that had not been presented to or decided by the court whose decision is being reviewed. See, *e.g. Wozniak* v. *Segal,* 56 Ill. 2d 457, 308 N. E. 2d 611; *Schatz* v. *Abbot Laboratories,* 51 Ill. 2d 143, 281 N. E. 2d 323; *Doran* v. *Cullerton,* 51 Ill. 2d

553, 283 N. E. 2d 865; *Wadlington* v. *Mindes*, 45 Ill. 2d 447, 453, 259 N. E. 2d 257; *Hux* v. *Raben*, 38 Ill. 2d 223, 230 N. E. 2d 831.

Although the appellate court held that it was without jurisdiction to review the order of June 1, 1973, in its opinion it found all of the facts necessary for a review of that order, and applied its finding when it restricted execution upon the judgment of $120,000 to the sum of $80,000. In its opinion the court stated:

> "* * * The important and decisive element is that it is clear and certain that this agreement was not disclosed to any of the courts involved in this proceeding until February 22, 1973, virtually three years and six months after its execution. The agreement was not disclosed to the trial judge who presided over the original jury trial, to this court on the first appeal, to the Supreme Court in connection with the petition for leave to appeal and in other matters brought before it, or to any of three trial judges who heard some portions of the subsequent proceedings. The only portion of the transaction between these parties ever disclosed to any court until February 22, 1973, was the assignment of judgment which was entered into on January 27, 1970." 23 Ill. App. 3d at 641, 320 N. E. 2d at 232.

Concerning the knowledge of Calumet's attorney as to the settlement, the appellate court found from the affidavits "that there is a possibility that counsel for Calumet was generally aware of the existence of some arrangement between attorneys for plaintiffs and for the Lessors." (23 Ill. App. 3d at 641, 320 N. E. 2d at 232.) But later, in concluding that interest on the sum of $80,000 did not commence to run until February 22, 1973, the date upon which the amount of the settlement was disclosed, the appellate court said:

> "* * * If we were to hold that interest commenced to run on the sum of $80,000 from the date of entry of the judgment, we would be rewarding concealment of the agreement from the court and encouraging such tactics for

BLEED THROUGH

> the future and we would simultaneously be penalizing Calumet unjustly for its failure to tender payment when the amount due was actually unknown." (23 Ill. App. 3d at 645, 320 N. E. 2d at 234.)

The trial court appears to have taken the position that fraudulent concealment had not been shown on the ground that the attorneys for Calumet "made no official inquiry" into whether or not the plaintiffs' claim against the lessors had been settled. This position was erroneous. The burden rested upon the persons who had entered into the settlement to disclose it. It was not the responsibility of Calumet or of the trial judge to ferret out the facts. It has long been held that "a suppression of the truth may amount to a suggestion of falsehood. And if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." *Stewart* v. *Wyoming Cattle Ranche Co.*, (1888), 128 U. S. 383, 388, 9 S. Ct. 101, 103, 32 L. Ed. 439, 441; see also *People ex rel. Chicago Bar Association* v. *Gilmore*, (1931), 345 Ill. 28, 46, 177 N. E. 710; *Ellman* v. *De Ruiter* (1952), 412 Ill. 285, 106 N. E. 2d 350.

[3] If the agreement was to be successful, it was imperative that it be concealed. It provided that the Lessors would pay $80,000 to the plaintiffs as a "purchase of peace." After that agreement was entered into, there was no longer any controversy whatsoever remaining to be decided between those two parties. After the agreement was entered into, the Lessors no longer had a claim for third-party indemnification against Calu-

met in any amount in excess of $80,000, and the plaintiffs, as has been stated, had no right of action whatsoever against Calumet. Disclosure would have frustrated the scheme. While our constitution provides that "Circuit Courts shall have original jurisdiction of all justiciable matters" (Ill. Const. 1970, art. VI, sec. 9), it does not confer jurisdiction to decide sham controversies. No "justiciable matter" exists where two former adversary parties have settled their differences as to all the issues they are purportedly litigating before the trial court. See generally *Moore* v. *Charlotte-Mecklenburg Board of Education* (1971), 402 U. S. 47, 91 S. Ct. 1292, 28 L. Ed. 2d 590; *Sturgeon* v. *Powell* (1969), 118 Ill. App. 2d 382, 254 N. E. 2d 837; Wright, Law of Federal Courts, sec. 12 (1970).

The trial court relied on our opinion in *Reese* v. *Chicago, Burlington & Quincey R. R. Co.* (1973), 55 Ill. 2d 356, 303 N. E. 2d 382, but we agree with the appellate court that there are crucial differences between the two cases. In *Reese*, both defendants could have been found directly liable to the plaintiff, while in the present case, Calumet was not liable directly to the plaintiffs. In *Reese*, the railroad company was dismissed from the action, and the court was not placed in the position of trying a non-existent controversy. (See generally *Lum* v. *Stinnett* (1971), 87 Nev. 402, 488 P. 2d 347.) And in *Reese*, the remaining defendant knew of the loan receipt agreement during the trial. The majority opinion in *Reese* acknowledged that loan agreements could tend to "undermine the adversary nature and integrity of the proceedings" (55 Ill. 2d at 364, 303 N. E. 2d at 387), but expressed the belief that this danger could be avoided by permitting the remaining defendants to cross-examine witnesses as to any possible bias resulting from the loan agreement and by permitting the defendant to introduce the loan agreement for consideration by the jury. Quite apart from any question as to the effectiveness of these safeguards (see Note, The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions, 47 So. Cal. L. R.

BLEED THROUGH

1393 (1974)), they cannot be utilized if the loan agreement is kept secret. See *Ward* v. *Ochoa* (Fla. 1973), 284 So. 2d 385.

For the reasons stated, the judgments of the circuit court of Cook County and of the appellate court are reversed.

Judgments reversed.

State of Illinois,

Office of

CLERK OF THE SUPREME COURT,

Springfield 62706.

November 21, 1975.

Moriarity, Rose & Hultquist
Attorneys at Law
150 N. Wacker Drive—Suite 2400
Chicago, Illinois 60606

No. 47187—Frank Gatto, Admr., etc., appellee, *vs.* Walgreen Drug Co., etc., et al., etc., appellees (Calumet Flexicore Corporation, appellant). Appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petitions for rehearing in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS,
Clerk of the Supreme Court.

FILED
MAR 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173

FRANK GATTO, ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO AND INDIVIDUALLY,
Plaintiffs and as Assignees of Third Party Judgment-Appellees-Petitioners,

vs.

WALGREEN DRUG CO., ETC., ET AL., INCLUDING CURTIS, FRIEDMAN & MARKS, ETC.,
Defendants-Third Party Plaintiffs and Assignors of Third Party Judgment-Appellees-Respondents (actually Petitioners),

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant-Appellant-Respondent.

RESPONDENT'S ANSWER TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

THOMAS K. PETERSON,
230 West Monroe Street,
Chicago, Illinois 60606,
(312) 236-7722,
Attorney for Third-Party Defendant-Appellant-Respondent.

MEYERS AND MATTHIAS,
Of Counsel.

INDEX.

	PAGE
Questions Presented	2
The Statement of the Case	3
The Secret Agreement of August 1, 1969	3
The Disclosure of the Secret Agreement on February 22, 1973	4
Calumet's Second Amended Petition of April 14, 1973	4
The Relief Sought by Calumet	5
Perpetrating the Cover-up by Acts of Fraud	5
The Trial Court's Ruling on Calumet's Second Amended Petition	7
The Illinois Appellate Court's Opinion	7
The Illinois Supreme Court's Opinion	8
Argument	9
Noncompliance with Rule 23(f)	9
The Petitioners Are Many Distinct Parties	9
The Courts Cannot Be Used for Sham Trials	10
The False Issues Regarding the Affidavits	10
The Knowledge of Calumet's Attorney	10
The Petitioners Never Sought a Trial	11
The Petitioners' Four Counter-Affidavits	11
Why the Cover-up if the Judges and Calumet's Attorney Knew of the Secret Agreement?	12
Did the Judge Know?	12
To Be Successful There Had to Be a Cover-up	13
The Secret Agreement Is Binding Between the Parties to It—but Not Against the Judicial System Nor Calumet	14
Conclusion	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1173.

FRANK GATTO, ADMINISTRATOR OF THE ESTATE OF SOPHIE GATTO AND INDIVIDUALLY,
Plaintiffs and as Assignees of Third Party Judgment-Appellees-Petitioners,

vs.

WALGREEN DRUG CO., ETC., ET AL., INCLUDING CURTIS, FRIEDMAN & MARKS, ETC.,
Defendants-Third Party Plaintiffs and Assignors of Third Party Judgment-Appellees-Respondents (actually Petitioners),

vs.

CALUMET FLEXICORE CORPORATION,
Third Party Defendant-Appellant-Respondent.

RESPONDENT'S ANSWER TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

QUESTIONS PRESENTED.

1) Can the Courts be used for "sham trials" when there is no longer any "justiciable matters" or controversies because the Plaintiffs and Defendants have settled their differences?

2) In attempting to cover-up a secret settlement, does the judicial system allow the attorneys for the plaintiffs and defendants—third-party plaintiffs to subsequently file false pleadings, false affidavits, make false statements and seek improper Court orders?

THE STATEMENT OF THE CASE.

(The Petitioners "Statement of the Case" contains numerous misstatements and many deceptive statements of facts. No beneficial purpose could be derived in setting forth the true facts because of the illogical and/or nonchronological order used by the Petitioners. However, one example might suffice to illustrate the point. It is asserted that counsel for Calumet's counsel, third party defendant in an alledged common-law indemnity claim, made a ". . . threat that the plaintiffs would never live to see the day that they would collect any sum of monies from respondent. . . " (Petitioners' Pet. p. 4.) It is untrue that any threat was made. The deceptiveness is that the rest of the statement quoted is factual true—because any alleged claims for personal injuries that the Gattos as plaintiffs may have asserted against Calumet as a defendant were already barred by the Statute of Limitations of the State of Illinois. (App. to Pet. p. 25, 61 Ill. 2d 513, 514, 337 N. E. 2d 23, 24.)

(Set forth below is a factual and chronological statement of the pertinent facts. Those matters, set forth within parathesis and in italized type have been added for clarification purposes only.)

The Secret Agreement of August 1, 1969.

Before or during the first week of a 2½ week trial for personal injuries, the plaintiffs and two of the defendants (Lessors & Lessee) entered into a secret hand-written Agreement. *(The Illinois Supreme Court's opinion has the full agreement and the pertinent, preliminary history. [App. to Pet. pp. 26-28, 61 Ill. 2d 513; 337 N. E. 2d 23].)* The Agreement was identical to each defendant except for the amount of payment to be paid to the plaintiffs: $80,000.00 on behalf of the Lessors; and $15,000.00 on behalf of the Lessee. *(We will hereafter refer*

to the Lessor's Agreement.) The Agreement set forth that the plaintiffs' acknowledged receipt of the payment and that the payment was "solely as a purchase of peace." The plaintiffs "covenant and agree" not to execute against the Lessors. (App. to Pet. pp. 27-28.)

The second part of the secret Agreement stated that if the Lessors could recover more than $80,000.00 in their common-law indemnity action against a third-party defendant *(Calumet, the Respondent herein),* then the distribution would be as follows: (A) any amount up to the $80,000.00 would become and remain the sole property of the party that made the $80,000.00 payment to the plaintiffs on behalf of Lessors, and (B) any amount in excess of the $80,000.00 would be paid over by the third-party plaintiffs to the plaintiffs. The Lessors, at their sole option could "attempt to collect" the third-party judgment or permit the plaintiffs, at their own expense, to attempt to collect the third party judgment. (App. to Pet. pp. 27-28.)

The Disclosure of the Secret Agreement on February 22, 1973.

The Agreement of August 1, 1969 was kept secret during the trial and for 3½ years thereafter. When the trial court finally ruled that it would allow certain discovery to be undertaken by Calumet's attorneys, the attorneys for the Plaintiffs and Lessors, the Petitioners herein, produced on February 22, 1973 the secret Agreement of August 1, 1969. In a sworn affidavit dated March 31, 1973, one of the attorneys for the Petitioners herein, Robert Hultquist, stated that on February 22, 1973 ". . . the Agreement itself was *finally* brought to the attention of Mr. Peterson *(Calumet's attorney)* and the Court. . . ." (Abst. p. 138.)

Calumet's Second Amended Petition of April 14, 1973.

Thereafter, Calumet filed its Second Amended Petition setting forth that "subsequent to the agreement, plaintiffs had no justiciable cause of action *(against the Lessors)* to submit to

BLEED THROUGH

trial, verdict and judgment. Hence the trial was a sham and a charade and the resulting verdicts and *(plaintiffs')* judgments are void (as against the Lessors). As the underlying *(primary)* judgment is void, the *(Lessors')* judgment on the third-party action *(seeking common-law indemnity against Calumet)* is likewise void." (App. to Pet. p. 28, A. 104.)

The Relief Sought by Calumet.

The primary relief sought was to have the primary and third-party judgments declared void and to have the causes of actions dismissed nun pro tunc as of the date of the secret Agreement, August 1, 1969. (App. to Pet. p. 28.) The ultimate relief sought by Calumet was to take ". . . discovery *(so as)* to allow the court to impose appropriate sanctions against *(those)* persons who participated in the scheme to defraud Calumet . . . (. . . and [*who*] perpetrated the aforesaid fraud on the Court, the judicial system, and upon Calumet, its insurers [*and its attorneys*]) . . . an order assessing damages including attorneys' fees, and any other relief that justice required". (App. to Pet. p. 28, A. 107.)

Perpetrating the Cover-up by Acts of Fraud.

Regarding the "ultimate relief", seventeen examples of the Petitioners' acts in perpetrating the aforesaid fraud were set forth as excerpts from the then Record of the case. These were photostated for an Appendix which was filed with the Second Amended Petition on April 13, 1973. (A. 108-122.) A few of these examples will suffice. The true facts are also provided—many of which were set forth in the opinion of the Illinois Supreme Court. (App. to Pet. pp. 25-28)

> To cover-up the secret Agreement, the Gattos and Lessors filed post-trial motions and notices of appeals against each other. In fact, they had settled and "purchased their peace" during the 1st week of the trial. (A. 111-114.)

After July 5, 1972, the attorneys and Frank Gatto filed affidavits and made representations to the courts and Calumet's attorney that 4-5 months after the trial, the Gattos had been loaned $60,000.00 dollars on behalf of the Lessors and that this money was the only money that had ever been received by the Gattos. In fact, there was no such loan; there was no payment of $60,000.00 five months after the trial, payments had been received during the trial in the sums of $80,000.00 on behalf of the Lessors and $15,000.00 on behalf of the Lessee, and there was no language concerning repayments of these amounts, conditionally or otherwise.

In affidavits, motions and representations before the Courts, the attorneys for the Gattos and Lessors contended that an assignment for the third-party judgment four to five months after the trial was the only agreement that had ever been entered into. (A. 114-115, A. 115, A. 118-119, A. 120-121.) In fact the hand-written agreement, which is dated during the first week of the trial, was signed by Mr. and Mrs. Gatto on each of the five pages, which was witnessed by their attorneys, and was also signed by each of the respective attorneys for the Gattos, the Lessors and the Lessee.

Two and one-half years after the trial, the attorneys for the Gattos and the Lessors filed a Petition with the Illinois Supreme Court seeking a Writ of Mandamus. Among other requests, it included a proposed order directing the clerk of the trial court to issue execution against the Lessors as defendants regarding the primary judgment of $120,000 in favor of the plaintiffs. (A. 119-120.) In fact, both parties were then represented by the same attorneys. The still secret Agreement of August 1, 1969 was entitled "An Agreement Not to Execute" with the plaintiffs covenanting against taking any execution.

Various motions and affidavits were filed. *(They are superfluous to the actual issue decided by the Illinois Supreme Court. Since the Petitioners have misrepresented the contents or failed to provide the facts as to motions and the trial court's rulings thereon, these facts must be provided. However, Calumet be-*

BLEED THROUGH

lieves that if this is done within its "Argument Section", the brief will be shortened.)

The Trial Court's Ruling on Calumet's Second Amended Petition.

On June 1, 1973, the trial court hearing the Second Amended Petition entered an Order confirming jurisdiction, denying certain relief, including the discovery sought by Calumet, and continued the cause (the Second Amended Petition) for a hearing on a motion to limit the amount of execution as to the third-party judgment. An appropriate motion was filed by Calumet. On August 21, 1973, an Order was entered denying all relief. An appeal followed.

The Illinois Appellate Court's Opinion.

The Illinois Appellate Court held that it did not have jurisdiction as to those matters covered under the Order of June 1, 1973. It did find that "The important and decisive element is that it is clear and certain that this Agreement was not disclosed to any of the courts involved in this proceeding until February 22, 1973, virtually three years and six months after its execution. The Agreement was not disclosed to the trial judge who presided over the original jury trial, to this (*Appellate)* court on the first appeal, to the *(Illinois)* Supreme Court in connection with the Petition for leave to appeal and in other matters brought before it (*the Petition for a Writ*) or to any of the three trial judges who heard some portions of the subsequent proceedings." (App. to Pet. p. 19, 23 Ill. App. 3d at 641, 320 N. E. 2d at 232.) The Appellate Court then directed that the execution upon the third-party judgment of $120,000.00 be limited to the sum of $80,000.00. (App. to Pet. p. 22.) In response to Calumet's petition for rehearing, the court further held that the statutory interest could commence only from the date of the disclosure of the secret Agreement on February 22, 1973 as that was the first time the amount due was actually known. (App. to Pet. p. 22A-B.)

The Illinois Supreme Court's Opinion.

The Illinois Supreme Court found that the appeal had been filed by Calumet at the proper time under the Illinois Supreme Court Rules. It further held that there was no need to remand the matter as the issues could be decided by it. It found that the Appellate Court's position that Calumet's attorney knew of the settlement was inconsistent with the Appellate Court's finding as to when the amount due was actually known. It noted that the "burden rested upon the persons who entered into the settlement to disclose it. It was not the responsibility of Calumet or of the trial judge to ferret out the facts. It has long been held that 'a suppression of the truth may amount to a suggestion of falsehood . . .'" (App. to Pet. p. 33.) The Illinois Supreme Court found:

> "If the Agreement was to be successful, it was imperative that it be concealed. It provided that the Lessor would pay $80,000.00 to the plaintiffs as 'purchase of peace.' After that agreement was entered into, there was no longer any controversy whatsoever remaining to be decided between these two parties. After the agreement was entered into, the Lessors no longer had a claim for third-party indemnification against Calumet in any amount in excess of $80,000, (*which would have to be brought on behalf of the Lessors' insurance carrier under Sec. 42 of the Illinois Civil Practice Act*) and the plaintiffs, as has been stated, had no right of action whatsoever against Calumet. Disclosure would have frustrated the scheme. While our constitution provides that 'Circuit Courts shall have original jurisdiction of all justiciable matters' (Ill. Const. 1970 art. VI, sec. 9), it does not confer jurisdiction to decide sham controversies. No 'justiciable matter' exists where two former adversary parties have settled their differences as to all issues they are purportedly litigating before the trial court. See generally *Moore* v. *Charlotte-Mecklenburg Board of Education* (1971), 402 U.S. 47, 91 S. Ct. 1292, 28 L. Ed. 2d 590; etc." (App. to Pet. pp. 33-34.)

The Court then noted that the secret Agreement had no relation to loan agreements. It concluded by reversing the judgments of the trial court and the Appellate Court without remandment.

BLEED THROUGH

ARGUMENT.

I.

NONCOMPLIANCE WITH RULE 23(f).

Petitioners have failed to show how they first raised their alleged denial of due process and specifically the lower court's adverse ruling thereon. Likewise they failed to cite how they preserved this point during the various appeals and the specific rulings by the higher courts. We suggest that they have not done this because they have never raised the contentions that they are now alleging as being a denial of due process.

II.

THE PETITIONERS ARE MANY DISTINCT PARTIES.

The Petitioners herein attempt to confuse (if not mistake) the position and rights of the various parties to the litigation. Each party has a distinct capacity. There is (1) the Gattos as plaintiffs; (2) the Gattos as Assignees of the third-party judgment five months after the verdicts; (3) the Lessors as defendants; (4) the Lessors (actually their insurer) as third-party plaintiff; (5) the Lessors (actually their insurer, CNA) as the Assignors of the third-party judgment.

If the secret Agreement had never been uncovered, and the Assignees (Gattos) had collected on the third-party judgment, distribution of those proceedings would have been pursuant to the terms of the "assignment" just as if the "assignment" had been made to a stranger to the suit. If the insurer of the Lessors had gotten any money from the Gattos, it would have been from the Gattos as the Assignees. The Gattos would never have paid or repaid the Lessors (actually their insurers) as "plaintiffs."

III.

THE COURTS CANNOT BE USED FOR SHAM TRIALS.

The ruling of the Supreme Court of Illinois did not revolve around the issue of who knew or did not know of the secret Agreement. *Arguendo,* if everyone in the world knew, including the judges and Calumet's attorney, once the "Agreement Not To Execute" dated August 1, 1969, was entered into, there was no longer any "justiciable issue" which could be decided by the court. Therefore, there was no "subject matter" over which the courts could have jurisdiction. Hence the claim of the plaintiffs against the Lessors had to be dismissed instanter. Any further proceedings between those two parties were a "sham". Any subsequent verdicts or judgments were void. And the third party judgment, which was only for indemnification of that void primary judgment, would likewise be void.

These are not questions of fact for a jury but are questions of law. There are no issues to be debated. The Supreme Court of Illinois properly ruled that the primary judgment was void and therefore the third party judgment was also void.

IV.

THE FALSE ISSUES REGARDING THE AFFIDAVITS.

The Petitioners attempt to raise an issue of an alleged denial of due process regarding certain affidavits. Of course, the affidavits only go to the question of the coverup. (No affidavit can change the effect of the secret Agreement.) The Petitioners have failed to provide this Court the full facts concerning the affidavits so that it can intelligently understand the proper emphasis to be given to the affidavits.

THE KNOWLEDGE OF CALUMET'S ATTORNEY.

The only knowledge that Calumet's counsel had was that ". . . It was my *'opinion'* that Attorney Quinn *(representing the Lessors)* probably offered up to $80,000 and that Attorney

BLEED THROUGH

Tracey *(representing the Lessee)* had indicated $15,000." (A. 24.) Calumet's attorney had no knowledge of the acceptance of the offer by the plaintiffs, the payments of the monies during the trial, the "purchase of peace", the agreement not to execute, the undertaking of the sham trial to impose false liability, or any of the other arrangements arising from the secret agreement.

THE PETITIONERS NEVER SOUGHT A TRIAL.

The Petitioners have failed to cite where they sought a trial concerning the credibility of the affidavits of Calumet's attorney —as they allegedly seek here before this Court. The issue was not raised by them either in the Illinois Appellate Court or in the Illinois Supreme Court. In their Petition for a Rehearing before the Illinois Supreme Court, they did state that "the decision of the Illinois Supreme Court has charged the attorneys for the plaintiffs, Lessors and Lessee with fraudulent conduct." They asked that the matter be referred to the Chicago Bar Association Grievance Committee for a full investigation, and that it include an inquiry into the affidavits filed by Calumet's attorney. Besides this, the "Conclusion" of their brief only requested that the trial court's judgments be reaffirmed or, alternatively, if the amount of the judgments was to be limited, then there should be a judicial determination as to whether the secret Agreement was a covenant not to sue rather than a loan agreement. (Gattos *et al's* Petition for Rehearing to the Supreme Court of Illinois, pp. 17-19, 24.) They did not seek a trial on any of the issues that they are now alleging.

THE PETITIONERS' FOUR COUNTER-AFFIDAVITS.

The four affidavits alluded to by the Petitioners were filed with the trial court on or about May 31, 1973 over the objections of Calumet's counsel. These objections were made on May 31 and June 1, 1973 at the hearings and are part of the original record. The objections included that the affidavits were being

filed two months after the time provided for by the trial court's original ruling, that the trial court was denying Calumet's specific request to take the discovery depositions of the affiants, that the affidavits contained hearsay and were irrelevant. The trial court stated on May 31, 1973 that he would allow the affidavits to be filed but that he was not relving on them in any of his decisions. Calumet's attorney pointed out that the affidavits should still be stricken because undoubtedly opposing counsel would attempt to use these affidavits in the Appellate Courts. (*How true!*) This motion was also denied. Calumet moved for leave to prepare and to file transcripts made during the trial which were not part of the court record. The transcripts would show that the affidavits should be discredited, that discovery depositions should be allowed or that the affidavits should be stricken. Calumet was given leave to file the transcripts but the remaining portion of the motion was denied. The transcripts were subsequently filed. (A. 175-183.)

V.

WHY THE COVER-UP IF THE JUDGES AND CALUMET'S ATTORNEY KNEW OF THE SECRET AGREEMENT?

Did the Judge Know?

The Petitioners contend that the trial judge knew of the secret Agreement. (*Their attorney had answered the question in the negative during the oral arguments before the Illinois Appellate Court.*) The Petitioners have quoted extensively Justice Goldberg of the Appellate Court as to his knowledge concerning the trial from his reading of the Record. However, they failed to quote him on this issue:

> "The important and the decisive element is that it clear and certain that this Agreement was not disclosed to any of the Courts involved in this proceeding until February 22, 1973, virtually 3 years and 6 months after its execution. The Agreement was not disclosed to the Trial Judge who presided over the original jury trial, to this court on the first appeal, to the Supreme Court (*of Illinois*) in connection with the petition for leave to appeal and in other matters

BLEED THROUGH

brought before (*The Writ of Mandamus*) or to any of the three trial Judges who heard some portions of the subsequent proceedings. The only proportion of the transaction between these parties (*plaintiffs and Lessors*) ever disclosed to any Court until February 22, 1973, was the Assignment of Judgment which was entered into on January 27, 1970." (App. to Pet. p. 19.)

To Be Successful There Had to Be a Cover-up.

Petitioners have never been able to explain why they undertook the various acts that they did after the execution of the secret Agreement. Some of the acts were set forth in the Appendix filed with the Second Amended Petition by Calumet, *i.e.* the plaintiff and Lessors filing post trial motions and notices of appeals against each other. (A. 111-114.) Or why an attorney representing both parties would attempt to have the plaintiffs execute against the Lessors as a defendant, especially when there was a secret Agreement that the plaintiffs would not execute against the defendant. (A. 49-56.) Nor have they explained any of the other false statements, pleadings, affidavits.

It is apparent why the coverup, for as the Illinois Supreme Court noted:

> **"If the agreement was to be successful, it was imperative that it be concealed."** (App. to Pet. p. 33.)

It is just as apparent that the acts of the Petitioners were well thought out. They could only be considered to be acts which they knew were a fraud—a fraud upon the judicial system, upon the judges, upon opposing counsel, and upon many others who have been involved in this litigation. The misconceptions and misstatements they have made in their Petition to this Court only demonstrates that they have a philosophy that anything goes. It is this issue that this Court may want to consider. Certainly a Court always has the power (and the duty) to purge such activities from the judicial system. Not only would it affect these attorneys and the parties that they represent, but it would also set an example for others.

VI.

THE SECRET AGREEMENT IS BINDING BETWEEN THE PARTIES TO IT—BUT NOT AGAINST THE JUDICIAL SYSTEM NOR CALUMET.

In desperation, Petitioners contend that they have the constitutional right to enter into this type of contract. We do not dispute that, but they cannot enforce it against others. Nor can they contract to determine how the judicial system is to work. They settled their differences and that was the end of the litigation between the plaintiffs and the Lessors. Any subsequent judgments were void.

BLEED THROUGH

CONCLUSION.

The Petitioners have failed to show any basis for this Court to grant their Petition for a Writ of Certiorari to the Supreme Court of Illinois. The Petition should be denied.

Respectfully submitted,

THOMAS K. PETERSON,
230 West Monroe Street,
Chicago, Illinois 60606,
(312) 236-7722,
Attorney for Third-Party Defendant-Appellant-Respondent.

MEYERS AND MATTHIAS,
Of Counsel.